No. 82-1295

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ESCAMBIA COUNTY, FLORIDA, *et al.*,
Appellants,
v.
HENRY T. MCMILLAN, *et al.*

On Appeal from the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law, pursuant to Sup. Ct. Rule 36, moves the Court for leave to file the attached brief as *amicus curiae* supporting affirmance of the decision below. The appellees have consented to the filing of this brief, but appellants have refused to consent to this filing.

The Lawyers' Committee is a non-profit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership includes two former Attorneys General, one former District Judge, a former Solicitor General, several past presidents of the American Bar Association, and three law school deans. Protection of the equal voting rights of

citizens has been an important aspect of the work of the Committee. This Court has granted the Lawyers' Committee leave to file *amicus curiae* briefs in a number of important voting rights cases decided by this Court, including most recently *Rogers* v. *Lodge*, —— U.S. ——, 102 S.Ct. 3272 (1982); *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), and *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). The Lawyers' Committee has more than fifteen years experience in litigating voting rights cases, including several appearances in this Court.

This case has importance beyond its immediate facts because the Court's ruling will likely have an impact on a number of pending cases and future litigation in this area. The Lawyers' Committee is involved in several pending cases challenging at-large election schemes, and the Court's ruling may have an effect on this pending litigation.

We seek leave of this Court to file this brief to present arguments different from those presented by appellants, and which are likely to be different from those presented by appellees. Our discussion of the merits is primarily a fact-based presentation. We believe that the findings of the District Court on the merits fit squarely within the legal standards and factual criteria for a finding of discriminatory purpose set forth by this Court in *Rogers* v. *Lodge*, *supra*, *White* v. *Regester*, 412 U.S. 755 (1973), and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and that there are serious procedural difficulties with appellants' effort to overturn the District Court's factual findings at this stage of this case. On the remedy issue, we believe that the District Court did adopt the proper legal standard that deference should be accorded any legislatively-enacted plan, but that it was justified on the facts of this case in adopting a court plan. But unlike any of the parties to this appeal, we contend that the present posture of the case prevents the District Court from giving deference to appellants' proposed 5-2 redistricting plan

because that plan would be retrogressive of existing levels of black voting strength.

WHEREFORE, the Lawyers' Committee for Civil Rights Under Law respectfully moves the Court for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

SUMMARY OF ARGUMENT

Appellants' appeal on the merits is primarily a challenge to the District Court's findings of fact—its finding of intentional discrimination and its subsidiary findings which support its finding of intent. The District Court as the trier of the facts had the opportunity fully to review the record made and to judge the credibility of the witnesses and the evidence presented. Its judgment deserves deference, constituting as it does "an intensely local appraisal of the design and impact" (*White* v. *Regester*, 412 U.S. 755, 769-70 (1973)) of at-large voting in Escambia County. The District Court's findings were fully reviewed by the Court of Appeals and determined

upon application of the proper legal standard not to be clearly erroneous. Under these circumstances, the District Court's findings cannot be overturned in this Court except upon a very obvious and exceptional showing of error.

The meticulous factual findings of the District Court amply support an inference of purposeful discrimination. The findings made and legal principles applied both by the District Court and the Court of Appeals bring this case firmly within the ambit of *Rogers* v. *Lodge*, —— U.S. ——, 102 S.Ct. 3272 (1982), and *White* v. *Regester*, *supra*, in which this Court affirmed findings of Fourteenth Amendment violations based on evidence which is virtually identical to that present here showing purposeful exclusion of minorities from effective participation in the political processes in the counties. The evidence is even stronger here where the District Court found that the county commissioners gave inconsistent explanations for their preference for at-large voting and failed to provide a legitimate, nondiscriminatory explanation for maintaining this discriminatory system.

On the issue of the proper remedy, the District Court applied the proper legal standard in recognizing the rule of deference to legislative judgment in formulating a remedy, but properly rejected the 5-2 plans proposed by the county commissioners. The rationale of the rule of deference to the legislative judgment of the elected representatives of the people no longer applies when the proposed legislative plan has been rejected by the people themselves in referendum voting. Under these circumstances, the normal presumption of legitimacy accorded legislative plans cannot be indulged. Further, since the current county elections are being held under a plan which gives black voters the opportunity to elect candidates of their choice to one seat on the five-member commission, any of the 5-2 plans proposed by the commissioners would have the discriminatory effect prohibited

by the Voting Rights Act of reducing existing levels of black voting strength. The District Court fully considered the proposals of the county commissioners for a mixed 5-2 plan, and its rejection of those plans on the facts of this case does not constitute an abuse of discretion.

ARGUMENT

I. THE FINDINGS OF THE TWO LOWER COURTS THAT AT-LARGE COUNTY COMMISSION ELECTIONS HAVE BEEN MAINTAINED FOR A RACIALLY DISCRIMINATORY PURPOSE ARE NOT CLEARLY ERRONEOUS AND SHOULD BE AFFIRMED.

As in *Rogers* v. *Lodge*, —— U.S. ——, 102 S.Ct. 3272 (1982), this case involves the issue of whether at-large county commissioner elections violate the Fourteenth Amendment rights of black citizens. As this Court repeatedly has noted:

> At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* the representatives of the district. A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect several representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts. The minority's voting power in a multimember district is particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines.

102 S.Ct. at 3275. Accord: *Connor* v. *Finch*, 434 U.S. 407, 415 (1977); *White* v. *Regester*, 412 U.S. 755, 765 (1973); *Whitcomb* v. *Chavis*, 403 U.S. 124, 158-59 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544, 569 (1969).

In this case, although Escambia County is now approximately 20 percent black, no blacks have been elected

to the five-member county commission since at-large elections were adopted in 1901. The dilutive impact of this scheme is dramatically shown by the results of the most recent county elections. Under the second remedial plan adopted by the District Court, Escambia County was divided into five single-member districts, one of which is majority black in population and in registered voters. *McMillan* v. *Escambia County*, 559 F. Supp. 720, 726 (N.D. Fla. 1983), *on appeal*, No. 83-3275 (11th Cir.). In the primary election held under this plan in September, one black won nomination to the county commission for the first time in this century, and that black candidate is heavily favored to win in the November general election. Appellants in this appeal seek to overturn the District Court's decision and to return Escambia County to the countywide election system which has denied black voters an equal opportunity to elect candidates of their choice to county government since 1901.

A. The District Court Applied the Proper Legal Standard, and Its Finding of Purposeful Discrimination May Not Be Set Aside Unless Found To Be Clearly Erroneous and Upon a Very Obvious and Exceptional Showing of Error.

While at-large elections are not per se unconstitutional, they do violate the Fourteenth Amendment when

> "conceived or operated as purposeful devices to further racial . . . discrimination" by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population.

Rogers, *supra*, 102 S.Ct. at 3275 (quoting *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 149). Here the District Court applied the correct legal standard to hold, on the evidence presented at trial, that although the at-large voting system was not enacted for invidious purposes, "The present at-large election system for county commissioners is being maintained for discriminatory purposes" (J.S. App.

98a). Appellants do not dispute that the District Court applied the proper legal standard in ruling that to find a constitutional violation: "It must also be shown that discriminatory intent was a motivating factor in the enactment of the system or is a motivation in the present maintenance of the system" (J.S. App. 92a, citing *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)). Rather, appellants contend merely that the District Court's findings of intent are wrong based on the evidence presented.[1]

---

[1] The District Court found that Escambia County's at-large election system violated both the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (J.S. App. 100a-101a). Appellants have not asked this Court to address the question whether the District Court should have avoided decision on constitutional grounds if adequate statutory grounds were available. The District Court fully explained its decision to address both constitutional and statutory grounds for its decision (*id.*). At the time, the view was prevalent that the language of Section 2 of the Voting Rights Act no more than elaborates upon that of the Fifteenth Amendment (J.S. App. 101a; see *City of Mobile* v. *Bolden*, 446 U.S. 55, 60 (1980) (plurality opinion)). Since then, Congress has amended Section 2 of the Voting Rights Act to eliminate the requirement of proving discriminatory intent to make out a violation of that section. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (to be codified at 42 U.S.C. § 1973). Even though that section now employs a "results" test, a finding of discriminatory intent also would be sufficient to establish a violation of that section. "Plaintiffs must either prove such intent [footnote omitted], or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process." S. Rep. No. 97-417, 97th Cong., 2d Sess. 27 (1982). Thus, if the Court sustains the District Court's findings of discriminatory intent, no remand would be necessary. However, if the Court reverses the District Court's finding of intent, then the Court should remand to give the black voter plaintiffs an opportunity to satisfy the new Section 2 "results" test. *Brooks* v. *Winter*, 51 U.S.L.W. 3825 (U.S. May 16, 1983); *Cross* v. *Baxter*, 51 U.S.L.W. 3720 (U.S. April 4, 1983).

In their efforts to set aside the District Court's finding of intentional discrimination, appellants have failed to overcome three procedural barriers to disturbing the trial court's findings traditionally recognized by this Court: the "clearly erroneous" standard of Rule 52(a), Fed. R. Civ. P., the traditional deference this Court has given to the "intensely local appraisal" by District Courts of factual records in voting cases, and the two-court rule.

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Rule 52(a), Fed. R. Civ. P. In *Rogers* v. *Lodge*, 102 S.Ct. at 3278, and *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-88 (1982), this Court reaffirmed that findings of intent are governed by Rule 52(a)'s "clearly erroneous" standard of review. This standard therefore governs the trial court's finding in this case that at-large county commissioner elections are being maintained for a discriminatory purpose. In reviewing that finding, and the trial court's subsidiary findings which support that ultimate finding, this Court must give due regard, not only "to the opportunity of the trial court to judge the credibility of the witnesses," but also to the fact that the trial court's findings constitute "an intensely local appraisal of the design and impact [of at-large elections] in light of past and present reality, political and otherwise." *White* v. *Regester*, *supra*, 412 U.S. at 769-70.

The District Court's finding of purposeful discrimination also is governed by this Court's two-court rule, under which this Court has refused to disturb findings of fact concurred in by two lower courts in the absence of "very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); see also, *Rogers* v. *Lodge*, *supra*, 102 S.Ct. at 3278-79; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Blau* v. *Lehman*, 368 U.S. 403, 408-09

(1962). This Court must consider that the trial court's findings on the merits were thoroughly and completely reviewed by the Court of Appeals on two separate occasions, *McMillan* v. *Escambia County*, 638 F.2d 1249 (5th Cir. 1981), and 688 F.2d 960 (5th Cir. 1982). All of the contentions made by appellants in this appeal were fully considered, and ultimately rejected, by the Court of Appeals. Upon reevaluation in light of the proper legal standard set out in *Rogers* v. *Lodge*, the Court of Appeals thoroughly reviewed the District Court's finding of intentional discrimination and all of its subsidiary findings in light of the "clearly erroneous" standard. 688 F.2d at 965-69. Based on that review, the Court of Appeals specifically affirmed the trial court's finding: "Applying the standard enunciated by the Supreme Court in *Lodge*, we cannot say the district court's finding of intent was clearly erroneous." 688 F.2d at 969.

B. The District Court's Finding of Purposeful Discrimination Is Amply Supported by Its Subsidiary Findings of Fact and the Evidence Presented at Trial.

Appellants' argument on the facts of this case boils down to the contention that in the absence of "smoking gun" evidence, there can be no finding of discriminatory purpose. Thus, their argument that "there was no evidence that the system was established or maintained for a discriminatory purpose" (Brief of Appellants, p. 22) is really an argument that there is no "smoking gun." [2]

[2] Appellants contend that the Fifth Circuit erred in granting the petition for rehearing following this Court's decision in *Rogers* v. *Lodge*, in reversing its earlier decision, and in affirming the findings of the District Court in favor of the black voter plaintiffs because the legal standard applicable to constitutional vote dilution cases articulated in *Rogers* is the same as that enunciated in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), and *McMillan I* (638 F.2d 1249 (5th Cir. 1981)). Brief of Appellants, pp. 23-26.

Appellants are correct that both *Rogers* and *Bolden* require proof of purposeful discrimination, but the critical difference is in the effect to be given to circumstantial, indirect evidence of discrim-

The Escambia County commissioners have not admitted maintaining at-large voting to dilute black voting strength. But "smoking gun" evidence is rarely obtainable in cases of this sort,[3] and has never been required. This Court repeatedly has ruled that "discriminatory intent need not be proven by direct evidence." *Rogers supra*, 102 S.Ct. at 3276. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Arlington Heights, supra*, 429 U.S. at 265; *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). "Determining whether invidious purpose was a motivating factor demands a sen-

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inatory intent. The Fifth Circuit in *McMillan I*, despite its citation to *Arlington Heights*, apparently misconstrued *Bolden* to hold that circumstantial evidence was not sufficient to support a finding of discriminatory intent, and that proof of the *White-Zimmer* factors also was insufficient for a showing of invidious purpose (638 F.2d at 1243). Otherwise, there is no explanation for the Fifth Circuit's initial conclusion that there was "no evidence of racial motivation" (*id.* at 1245) and for its failure to discuss the District Court's *White-Zimmer* findings in its section on the county commission (*id.* at 1244-45).

Rogers makes clear that direct evidence of discriminatory intent is not required (102 S.Ct. at 3276), and by embracing the reasoning of *Nevett* v. *Sides*, 571 F.2d 209 (5th Cir. 1978), acknowledges that the *White-Zimmer* factors may support an inference of discriminatory purpose (*id.* at 3277-78).

[3] See *Lodge* v. *Buxton*, 639 F.2d 1358, 1363 n.8 (5th Cir. 1981), *aff'd sub nom. Rogers* v. *Lodge*, *supra*:

> We think it can be stated unequivocally that, assuming an electoral system is being maintained for the purpose of restricting minority access thereto, there will be no memorandum between the defendants, or legislative history, in which it is said, "We've got a good thing going with this system; let's keep it this way so those Blacks won't get to participate." Even those who might otherwise be inclined to create such documentation have become sufficiently sensitive to the operation of our judicial system that they would not do so. Quite simply, there will be no "smoking gun."

sitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights, supra*, 429 U.S. at 266.

On the factual record presented, there was ample evidence for the District Court to draw the inference that at-large voting has been maintained for a discriminatory purpose. The District Court found that although black citizens constitute 20 percent of the county's population and 17 percent of the county's registered voters, no black has been elected to the county commission since at-large voting was adopted in 1901 (J.S. App. 80a). Black candidates ran for the county commission four times, but no black candidate succeeded in winning either in the Democratic primary or in the general election (J.S. App. 80a-81a, Appendix A, 107a). Having failed four times between 1966 and 1970, black candidates became frustrated and gave up running again "because blacks cannot win" (J.S. App. 80a).

The District Court found that the complete record of county elections since 1955 shows "a consistent racially polarized or bloc voting pattern which operates to defeat black candidates" (J.S. App. 80a). Correlation analyses of the voting results for twelve races for both the county commission and the county school board (also elected at-large) demonstrate an overwhelming relationship between the race of the voters and the election results. In six of these election contests, over 90 percent of the variation in the vote is attributable to the race of the registered voters by precinct; the lowest R^2 showing the percent of the variation in the vote attributable to race was 69 percent (J.S. App. 107a-109a).[4] On similar facts, this Court held in *Rogers* v. *Lodge*:

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[4] This type of statistical analysis is commonly accepted by the courts as providing strong evidence of racially polarized voting. See, e.g., *Kirksey* v. *Board of Supervisors of Hinds County*, 554 F.2d 139, 149 (5th Cir. *en banc*), *cert. denied*, 434 U.S. 968 (1977); *Major* v. *Treen*, Civil No. 82-1192 (E.D. La. Sept. 23, 1983) (slip

> These facts bear heavily on the issue of purposeful discrimination. Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race. Because it is sensible to expect that at least some blacks would have been elected . . . , the fact that none have ever been elected is important evidence of purposeful exclusion.

102 S.Ct. at 3279. See also, *White* v. *Regester*, *supra* 412 U.S. at 766; *Perkins* v. *City of West Helena*, 675 F.2d 201, 213 (8th Cir.), *aff'd mem.*, —— U.S. ——, 74 L.Ed.2d 47 (1982).

While these facts in themselves may be insufficient to prove purposeful discrimination, both the District Court and the Court of Appeals considered additional evidence supporting an inference of intentional discrimination. The District Court found an extensive past history of official discrimination designed to disenfranchise black voters in Florida. The county commission and school board election systems "had their genesis in the midst of a concerted state effort to institutionalize white supremacy" (J.S. App. 74a). County Commissioners were appointed by the Governor from 1868 to 1901 "to ensure that blacks were not elected in majority black counties" (J.S. App. 74a). The poll tax and the white primary were adopted to disenfranchise black voters (J.S. App. 74a-75a). After the white primary was instituted, the Florida Legislature in 1907 instituted a "dual system" under which county commissioners were nominated from single-member districts in the white primary, but elected at-large in the general election to prevent the election of blacks (*id.*).

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op. at 30-35) (three-judge court); *Kirksey* v. *City of Jackson*, 461 F.Supp. 1282, 1289-90 (S.D. Miss. 1978), *vac'd and remanded on other grounds*, 625 F.2d 21 (5th Cir. 1980). See generally, D. BALDUS AND J. COLE, STATISTICAL PROOF OF DISCRIMINATION § 5.321 (1980); N. NIE, C. HULL, J. JENKINS, K. STEINBRENNER, AND D. BENT, SPSS: STATISTICAL PACKAGE FOR SOCIAL SCIENCES at 279-80 (2d ed. 1975).

When the white primary was struck down, at-large elections were mandated for primary elections as well (*id.*). The District Court also found that state-enforced segregation and discrimination "have helped create two societies in the city and county—segregated churches, clubs, neighborhoods and, until a few years ago, schools. These laws left blacks in an inferior social and economic position, with generally inferior education. The lingering effects upon black individuals, coupled with their continued separation from the dominant white society, have helped reduce black voting strength and participation in government" (J.S. App. 86a). The court found that this past history of state-sanctioned segregation and discrimination has contributed to the present racially-polarized voting patterns (J.S. App. 86a-87a). This past discrimination "has created barriers to the full participation of blacks in the present political processes," the District Court concluded (J.S. App. 89a).

> Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.

Rogers v. *Lodge*, *supra*, 102 S.Ct. at 3280. See also, *White* v. *Regester*, *supra*, 412 U.S. at 766; *Perkins* v. *City of West Helena*, *supra*, 675 F.2d at 211.

The District Court also made findings regarding elements of the county's electoral system which discriminate against minority voters and candidates. A filing fee of approximately $1,000 is required for candidates for the county commission (J.S. App. 80a). Escambia County is large in both population and geographic size; it currently has a population of 233,794 within an area of approxi-

mately 661 squares miles (Brief of Appellants, p. 3). Such a large size makes it "more difficult for Blacks to get to polling places or to campaign for office." *Rogers, supra*, 102 S.Ct. at 3280-81. Escambia County also has a majority vote requirement to win party nomination, and "as a practical matter, no one has in recent history won a general election without a majority," although no majority vote in the general election is legally required (J.S. App. 87a). This majority vote requirement, mandated by both law and electoral necessity, like the majority vote requirement in *Rogers* v. *Lodge* works "to submerge the will of the minority" and to "deny the minority's access to the system." *Rogers, supra*, 102 S.Ct. at 3281. Escambia County also requires that candidates run for specific seats with numbered places on the ballot. "This means that blacks are always pitted in head-on-head races with white candidates, and that the black community cannot concentrate its votes in a large field of candidates," the trial court found (J.S. App. 87a-88a). This Court also has noted the discriminatory impact of this requirement. *Rogers, supra*, 102 S.Ct. at 3281; *White, supra*, 412 U.S. at 766. These discriminatory features of the Escambia County electoral process, the District Court found, operate to deny black voters equal access to the political process: "The problems faced by blacks seeking access to the political processes are enhanced by the size of the at-large districts involved, the practical necessity or legal requirements of getting a majority vote to be elected, and the requirement that candidates run in numbered places" (J.S. App. 89a).

The District Court found that although the county commission has generally been responsive to black needs, it has been unresponsive in two critical areas. The District Court found that the "commissioners have failed to appoint any more than a token number of blacks to its committees and boards. The black population representing 20% of the county is thus served by an all-white board of commissioners which depends on virtually

(95%) all-white advisory panels" (J.S. App. 84a-85a). The District Court determined that these facts showing that blacks are "severely underrepresented" "has independent significance because of the absence or near absence of blacks in elected positions. With such a paucity of black elected and appointed representatives, blacks are excluded from all positions of responsibility in the governmental policymaking machinery" (J.S. App. 90a-91a). It concluded that "the lack of black appointees exacerbates the inability of blacks to participate fully in the political process and is further evidence of dilution" (*id.*). The District Court also found unresponsiveness in housing policy: "Special studies have indicated there may be housing discrimination within the county which has been ignored by the commissioners" (J.S. App. 85a). Such evidence of unresponsiveness, although not an essential element of a constitutional vote dilution claim (*Rogers, supra*, 102 S.Ct. at 3280 n. 9), does "increase[] the likelihood that the political process [is] not equally open to blacks." *Rogers, supra*, 102 S.Ct. at 3280. See also, *White* v. *Regester*, 412 U.S. at 769; *Perkins* v. *City of West Helena, supra*, 675 F.2d at 210-11.

These findings alone, under this Court's decisions in *Rogers* v. *Lodge* and *White* v. *Regester*, are sufficient to support the District Court's finding that at-large county commission elections have been maintained for a discriminatory purpose. The evidentiary factors supporting an inference of discriminatory intent found here are virtually identical to those found to exist in *Rogers* and *White*.[5]

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[5] The District Court's opinion also is fully consistent with *Whitcomb* v. *Chavis, supra*. The evidence of intentional denial to blacks of equal access to the political process which was absent in that case—evidence of denial of equal access, findings indicating that blacks were not allowed to register or to vote, exclusion from party affairs (403 U.S. at 149-50)—is fully present here on the District Court's findings.

In addition to these factors, the District Court gave two additional reasons for finding intentional discrimination: the "tenuous policy" behind the preference for at-large voting, and the absence of a consistent, legitimate, nondiscriminatory explanation for the retention of at-large elections.

The District Court ruled that "the evidence shows a tenuous policy behind the at-large requirement . . ." (J.S. App. 86a). As previously noted, from 1907 to 1954—when the white primary rule was in effect—primary elections for the county commissioners were conducted on the basis of single-member districts. These white primaries "were then tantamount to election" (*id.*), and thus dual system of district primaries and at-large general elections "worked, not surprisingly, to the unique disadvantage of blacks" (J.S. App. 75a). The Florida Legislature switched to at-large primaries for county school board elections "in the very first legislative session after the white primary was struck down" (*id.*). District primaries for county commissioners continued until 1954 (*id.*, 75a-76a). These important findings show that historically in Florida the preference for at-large voting has been rooted in discriminatory motives. "[A] state policy in favor of at-large districts that is shown to be 'tenuous' is evidentiary of invidious intent." *Cross* v. *Baxter*, 604 F.2d 875, 884-85 (5th Cir. 1975).

Further, the District Court carefully scrutinized the reasons given by the county commissioners at trial for retaining at-large voting and found that they had failed to present a legitimate, consistent, nondiscriminatory reason for its retention. In 1975 and again in 1977, before this action was filed, the county commissioners appointed committees to study the advisability of a change in the form of county government, and both committees recommended a change to single-member districts (J.S. App. 77a, 96a). Black voters also supported the recommendations for the change (*id.*). Despite these recommenda-

tions of their own appointed committees, the commissioners rejected these recommendations and refused even to permit a referendum allowing the county's voters to express their views on these recommendations (*id.*). One commissioner had served on one of these committees and joined in its recommendation in favor of single-member districts, but then repudiated his own recommendation when he voted with the other commissioners against holding the referendum (*id.*).

At trial, all the commissioners gave the same reason for striking single-member district elections from the referendum proposal; each stated his personal belief that the at-large requirement made the board more responsive to the needs of the community (J.S. App. 97a). However, the District Court found that this rationale was inconsistent with the manner in which the county commission actually operates (J.S. App. 97a-98a). In actual operation, each commissioner is responsible for county services within his district of residence (*id.*). County road funds, for example, are apportioned equally to each of the five districts, with each commissioner getting 20 percent of the road funds. "Their expressed concern about countywide elections and representation," the District Court found, "does not stand foresquare with the present operation of the commission and its business" (J.S. App. 98a).

Then, in their post-trial brief, the appellants gave a separate and different reason for retaining at-large elections—"the commissioners' desire to maintain their incumbency" (*id.*). Based upon its observation of the appellants' testimony at trial, the District Court found that "the reasonable inference to be drawn from their actions in retaining at-large districts is that they were motivated, at least in part, by the possibility that single district elections might result in one or more of them being displaced in subsequent elections by blacks [footnote omitted]" (*id.*). This inference is sound as a matter of law. While redistricting standards may take into

account the incumbency factor, under certain circumstances such as those which are present here the admitted goal of preserving an all-white group of incumbents may be considered tantamount to an admission of purposeful discrimination. As the three-judge District Court recently held in the Illinois legislative reapportionment case:

> Under the peculiar circumstances of this case, the requirements of incumbency are so closely intertwined with the needs for racial dilution that an intent to maintain a safe, primarily white district . . . is virtually coterminous with a purpose to practice racial discrimination.

Rybicki v. *State Board of Elections*, Civil No. 81-C-6030 (N.D. Ill. Jan. 12, 1982) (slip op. at 65). Accord: *Major* v. *Treen*, Civil No. 82-1192 (E.D. La. Sept. 23, 1983) (three-judge court) (slip op. at 76) (protection of white incumbents may not serve to justify racial gerrymandering in congressional redistricting).

Given the District Court's findings that appellants have failed to present an adequate, racially neutral justification for the retention of at-large elections, which according to the District Court's own findings are based upon its judgment of the credibility of the witnesses and its "intensely local appraisal" of the design and impact of Escambia County's countywide voting scheme, the District Court properly concluded that "[t]he present at-large election system for county commissioners is being maintained for discriminatory purposes" (J.S. App. 98a). *Arlington Heights*, *supra*, 429 U.S. at 267.

On the basis of these findings, for which there is ample support in the record, the District Court had broad discretion to draw an inference that at-large elections were being maintained by the county commissioners for a discriminatory purpose. These subsidiary findings were sufficient to sustain the District Court's finding of discriminatory purpose, and that finding should be affirmed.

II. THE DISTRICT COURT PROPERLY REJECTED THE COUNTY COMMISSIONERS' PROPOSED PLAN AS A REMEDY FOR PURPOSEFULLY DISCRIMINATORY AT-LARGE ELECTIONS.

Upon finding that an at-large voting scheme unlawfully dilutes black voting strength, the District Court is bound to give the local jurisdiction an opportunity to propose a new plan to remedy the violation. *Upham* v. *Seamon*, 456 U.S. 37, 41-42 (1982); *Wise* v. *Lipscomb*, 437 U.S. 535, 539 (1978) (plurality opinion); *Connor* v. *Finch*, 431 U.S. 407, 414 (1977). If the responsible legislative body is forthcoming with a plan, then the District Court must evaluate that plan to determine whether it meets federal constitutional and statutory requirements as a remedy for the violation. *Rogers* v. *Lodge*, *supra*, 102 S.Ct. at 3281; *Upham*, *supra*, 456 U.S. at 42; *Wise*, *supra*, 473 U.S. at 540. If no valid remedy is forthcoming from the legislature, "when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical to do so" (473 U.S. at 540), or when a jurisdiction covered by Section 5 of the Voting Rights Act fails to obtain preclearance of its new plan (*id.* at 541-42), then the District Court has the obligation to devise a redistricting plan which provides a proper remedy. This Court has set forth strict but reasonable standards governing such court-ordered redistricting plans: They must contain only *de minimis* deviations from population equality, and single-member districts are preferred unless the court can articulate a "singular combination of unique factors" that justifies a different result. *Connor* v. *Finch*, *supra*, 431 U.S. at 415-17; *Chapman* v. *Meier*, 420 U.S. 1, 26-27 (1975).

The District Court in this case fully recognized its obligation "to afford a reasonable opportunity for the legislative body itself to meet constitutional requirements by adopting a substitute measure" (J.S. App. 104a) and gave the county commissioners an opportunity to adopt a new plan which remedied the constitutional violation

found to exist. The county commissioners proposed a 5-2 plan under which five commissioners would be elected by single-member districts, and two commissioners would be elected at-large. However, the District Court, considering itself bound by the votes of five Justices in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978), determined that it could not accept the county commissioners' 5-2 plan once it had been rejected by the voters of Escambia County in the November 6, 1979 referendum (J.S. App. 67a-68a, 54a). The District Court determined (J.S. App. 68a), and the Court of Appeals agreed (688 F.2d at 971), that the Florida Constitution prohibits the county commissioners from legislatively altering their form of government in the absence of approval from the county's voters in a referendum supporting the adoption of a county charter. Accordingly, the District Court adopted a court-ordered remedy which provides for the election of all five commissioners from single-member districts.

Appellants contend that the District Court erred and should have deferred to the preferences of the county commissioners even in the absence of express state legislative authority to adopt a new plan under the "legislative judgment" test of *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981).

However, under the facts of this case, the District Court was correct to reject the commissioners' preferred plan. The rationale for the rule of deference to a legislature's plan is that it "reflect[s] the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court." *Wise*, *supra*, 437 U.S. at 548 (Powell, J., concurring opinion). Cf. *McDaniel* v. *Sanchez*, *supra*, 452 U.S. at 153 ("the policy choices of the elected representatives of the people"). The rationale for deferring to the legislative judgment of the elected representatives of the people disappears, however, when the voters themselves have rejected the very plan adopted by their representatives. Because the legis-

lative judgment is tainted by the people's rejection of such a plan, the normal presumption of legitimacy accorded a product of the democratic processes, see *Burns* v. *Richardson*, 384 U.S. 73, 84-85 (1966), cannot be indulged. Cf. *Wise*, *supra*, 437 U.S. at 549 (Powell, J., concurring) (Section 5 objection taints legislative judgment and deprives legislative plan of "normal presumption of legitimacy"). If, as the Court ruled in *McDaniel*, "the essential characteristic of a legislative plan is the exercise of legislative judgment" (452 U.S. at 152) presumably reflecting the popular will, that "essential characteristic" is no longer present when the plan contravenes the popular will itself. For these reasons, the District Court in 1979 was correct, on the particular facts of this case, in not deferring to the 5-2 plan offered by the appellants as a legislative plan.[6]

Further, there is an additional reason not directly considered by the courts below, in the present posture of this case, why the District Court was correct in reject-

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[6] In March, 1983, the District Court rejected different 5-2 plans offered by the appellants, but on grounds other than the one assigned in its 1979 opinions. The District Court ruled that appellants' plans (1) failed to "provide an adequate remedy for the unconstitutional vote dilution found to exist in this case"; (2) that adoption of a seven-member commission would constitute an intrusion upon Florida's state policy of five-member county commissions which is prohibited by *White* v. *Weiser*, 412 U.S. 783, 795 (1973); (3) violated the purpose and effect standard of Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c); and (4) violated Section 2 of the Voting Rights Act, as amended in 1982, 96 Stat. 134. 559 F. Supp. 720. The District Court's 1983 judgment is now on appeal to the Court of Appeals for the Eleventh Circuit.

The plans offered by the appellants in that proceeding, and the plan ordered into effect by the District Court, and the reasons given by the District Court for rejecting appellants' proposed plans supersede the District Court's 1979 remedial orders which are the subject of this appeal. Accordingly, the Court may well determine that meaningful review of the District Court's 1979 remedial orders, which are the only remedial orders presented in this appeal, has now been precluded by further proceedings in the court below.

ing the county commissioners' 5-2 proposal. Because the 1979 plan adopted by the District Court was determined to be malapportioned according to 1980 Census data, the District Court in 1983 adopted a new 5-district single-member plan. 559 F. Supp. 720. Under that plan, one district is majority black in both population and registered voters (559 F. Supp. at 726), and black voters thus have the opportunity to elect one member out of the five-member commission (20 percent). The 1983 county commissioner elections are now taking place under that plan, and as previously noted a black candidate already has won in the Democratic primary election.

Under these circumstances, black voters would be severely disadvantaged by the adoption of the county commissioners' 5-2 plan. At the 1983 hearing, appellants presented two 5-2 plans, one of which contained one majority black district and another—which the appellants preferred (*id.* at 726)—which had no district with a black majority (*id.*). Even if the first plan were adopted by the District Court, black voters would be able to elect only one member to a seven-member commission, and thus would be able to elect only 14 percent of the commission's membership. Further, the number of white-majority districts in which black voters would be unable to elect candidates of their choice would be increased from 4 to 6. Thus, it is apparent that the adoption of any of the 5-2 plans preferred by appellants would under the existing circumstances of this case "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1973).

The present court-ordered plan should serve as the benchmark for measuring the retrogressive effect of any of appellants' proposed 5-2 plans because it is the county redistricting plan which currently is in effect and under which the 1983 county elections have been held. See *Mississippi* v. *United States*, 490 F. Supp. 569, 582 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S.

1050 (1980); *Mississippi* v. *Smith*, 541 F. Supp. 1329, 1333 (D.D.C. 1982) (three-judge court), *appeal dism'd*, 51 U.S.L.W. 3789 (U.S. May 2, 1983). The *Beer* retrogression standard directly applies to jurisdictions covered by the "effect" standard of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Although not covered by Section 5, Escambia County by court order (see 559 F. Supp. at 727) has been put under Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c), which in words identical to those used in Section 5 prohibits implementation of any voting law change unless and until the District Court determines that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . ." Because the statutory language and legislative purpose of Section 3(c) are identical to that of Section 5 of the Voting Rights Act, the *Beer* retrogression standard should be applicable here and should preclude adoption of appellants' 5-2 plans. A similar retrogression standard also has been employed in constitutional litigation, and new plans which diminish existing levels of black voting strength have been found unconstitutional on Fourteenth and Fifteenth Amendment grounds. See, e.g., *Moore* v. *Leflore County Board of Election Commissioners*, 361 F. Supp. 603 (N.D. Miss. 1972), *aff'd*, 502 F.2d 621 (5th Cir. 1974).

The District Court therefore was correct in not approving appellants' 5-2 proposal because, under the circumstances of this case, it would have a present retrogressive effect and therefore would constitute a statutory violation of Section 3(c) of the Voting Rights Act.

Although the notion of adopting a mixed system has some facial appeal, see *City of Mobile* v. *Bolden*, 446 U.S. at 82 (Blackmun, J.), extensive empirical analyses in the social science literature indicate that mixed systems, with some officials elected by district and others elected at-large, also have the discriminatory impact of

reducing the opportunities for minority representation in county and city government. See, e.g., Engstrom and McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 Am. Pol. Sci. Rev. 344 (1981); Davidson and Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. Politics 982 (1981).

Although such a mixed system might appear to be an appealing compromise between the desires of black voters for representation in county government—which is denied them under the all at-large system—and the stated wishes of the incumbent commissioners for some county-wide seats to represent the county as a whole, such a system is inadequate as a remedy for at-large voting because it retains in the at-large seats elements of the system found to have been maintained for invidious purposes. This case is different from *Bolden* because here the District Court on several occasions, most recently in March, 1983 (559 F. Supp. 720), did consider appellants' proposals for expanding the size of the county commission and providing for the election of at least some commissioners at-large (cf. 446 U.S. at 82). After giving full consideration to appellants' proposals, the District Court exercised its discretionary remedial authority (see *Rogers* v. *Lodge*, *supra*, 102 S.Ct. at 3281) in rejecting appellants' proposals. In reviewing the District Court's decision, the Court of Appeals determined that "the remedial plan adopted by the district court was fully within its discretion." 688 F.2d at 972. On the record in this case, there is no basis for this Court—twice removed from the "intensely local appraisal" of the trier of facts—to conclude that there was an abuse of discretion.

CONCLUSION

For the foregoing reasons, and the basis of the authorities cited, the judgment below should be affirmed.

Respectfully submitted,

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